FILE COPY

APR 21 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 477. October Term, 1929.

BARKER PAINTING COMPANY,
Petitioner,

and

LOCAL No. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.*,
Respondents.

MEMORANDUM OF UNREPORTED CASES.

MERRITT LANE,
Attorney for and of Counsel with Petitioner.

Arthur W. Cross, Law Printer, 31-37 Lafayette Street, Newark, N. J.

Supreme Court of the United States

BARKER PAINTING COMPANY, *Petitioner,* *and* LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.*, *Respondents.*	*On Certiorari.* *No. 477 October Term, 1929.*

MEMORANDUM OF UNREPORTED CASES.

State of Rhode Island and Providence Plantations.
PROVIDENCE, *sc:*

SUPERIOR COURT.

Eq., No. 7502.

GEORGE A. DOUGLAS & BROTHER, INC.,

vs.

CLARENCE MALLETTE ET AL.

Rescript.

BAKER, *J.:*

Heard on prayer for a preliminary injunction to restrain the respondent from preventing the employment of certain members of the Painters' Union on work in the City of Providence at the scale of wages and under the terms and conditions regularly recognized by the Painters' Local Union for work in said Providence.

The single question in issue in this case relates to the legality or illegality of certain sections of the constitution of the National Union of Painters, Decorators and Paperhangers of America, as passed at one of the general conventions of said Union.

The rules or sections in question provide in substance that where there is a difference between the wage scales of two cities, all members of the Union employed upon a job done in one of two cities by an employer from the other shall receive the higher of the two wage scales, and if there is a difference in the work day, the shorter will prevail. They also provide that at least 50% of the employees shall be from the locality in which the work is being done. These rules or sections are enforced by penalties imposed upon the members of the Union by the Union itself.

The evidence in this case shows that the complainant is a Connecticut corporation located in Bridgeport in said State. It took a contract to do certain painting in the City of Providence in this State. The wage scale as recognized by the Union in the City of Bridgeport is $9 per day for a day of eight hours and five days per week. The scale of wages in effect in the City of Providence as recognized by the local Union is $8 a day for an eight-hour day for five and a half days per week. The complainant brought with it to the City of Providence a man named Purdy as foreman, to whom it paid the Bridgeport rate of wages. It employed in Providence several Union painters to whom it paid the Providence rate. Work was done under the contract for a short time, when the matter came to the attention of the business agent of the Providence Union. He had a conference with the employees on the job and after some little delay the men, including Mr. Purdy, stopped work. The complainant's affidavits tend to show that the business agent of the Providence Union called the men out. He testifies, however, that he merely called the attention of the men to the rules above referred to and explained to them that they were violating those rules and under the regulations of the Union became liable to a fine, and that thereupon the men stopped work of their own volition. This seems to be the only question of fact in dispute.

The rules of the Union in question have been passed upon recently by a few courts in cases where the facts very strongly resemble the situation in the present case. There are two sharply defined and distinct lines of cases. In Hass, Inc., *vs.* Local Union No. 17, &c., 300 Fed. Rep. 894, decided in the U. S. District Court for the District of Connecticut, the Court held, in a rather brief opinion, that it would refuse on motion to dismiss a bill of complaint similar to the bill in the case at bar. The decision seems to rest on an opinion rendered in the New Jersey Chancery Court, which said opinion has since been overruled by the Court of Errors and Appeals in New Jersey, and on an opinion of a lower court in the District of Columbia. The other line of cases holds that in a proceeding such as this the complainant is not entitled to relief.

N. J. Painting Co. *vs.* Local No. 26, &c., 126 Atl. Rep. 399.

This case reversed the decision of the N. J. Chancery Court above referred to.

In the case of H. Newton Marshall *vs.* Brotherhood of Painters, Decorators and Paperhangers of America, &c., No. 10111, March Term 1925, Common Pleas No. 1, Philadelphia, Pa., a decision of a lower court, the opinion of the New Jersey Court of Errors & Appeals, *supra,* was followed, denying the complainant relief.

After careful consideration of the question involved, the Court is inclined to follow the law as laid down in the case of N. J. Painting Company *vs.* Local Union No. 26, *supra.* The case of Hass, Inc., *vs.* Local Union No. 17, *supra,* seems to be decided on the theory that the rules in question are in restraint of trade, tend to discriminate unjustly against contractors and bidders away from the locality where the work is being done and that the public is injured.

The Court finds itself unable to follow this line of reasoning entirely. In the judgment of the Court the rules in question are not in restraint of trade within the generally accepted meaning of that phrase. It should be noted that the rules under discussion are regulations of the Painters' Union and are not public statutes. If the public is injured in any way by the enforcement of the rules in question, which fact the Court does not believe, it is certainly a very remote injury. While perhaps it is true that the regulations under discussion may operate incidentally in some cases against contractors and bidders away from the locality where the work is being done, this does not necessarily make the rule illegal in the judgment of the court.

It would appear to the Court that the rules and regulations in question are directed at no one person or no one contractor in particular. They are not aimed at the complainant nor at out of town contractors in general. They apply to all union work over the entire United States.

In the judgment of the Court the fundamental purpose of the sections and rules in question is to regulate wages, methods, and hours of work. The rules were apparently passed in good faith by the Union for the regulation of its own affairs, and not for the purpose of discriminating against any one, or of restraining trade or of injuring the public. They obviously have in mind the establishing of a sliding scale of wages. It would seem clear that from the point of view of the Union it would be unwise to have different members of the Union from different localities working on the same job in the same place receiving different wages for doing the same work. It clearly became necessary for the Union to regulate this matter by some rule; particularly as it is common for large employers at the present time to take contracts away from the locality in which they are situated, and frequently to move

their own employees from place to place on different jobs. Apparently the Union had the choice of fixing the wage scale at the higher of the two, where there was a difference in the wage scales of the localities, or at the lower of the two, or at the scale of wages prevalent in the place where the work was being done. Perhaps this latter might have been fairer, or the more reasonable regulation, but that is open to argument, is a question upon which all might not agree, and the whole matter in any event is one relating to the internal affairs of the Painters' Union. If the Union had provided that the lower of the two wage scales prevailed, or that the wage scale of the place where the work was being done governed, the Court can readily see where, as in the instant case, men employed in Bridgeport at $9 a day might well refuse to come to work in Providence at $8 a day. Further, if the lower of the two wage scales should be selected, the Court can easily imagine a case where a local contractor living in the place where the wage scale was high might be just as much discriminated against in bidding as the complainant contends it is.

The Union has seen fit to provide that under the facts of such a case as is now before the court the higher of the two wage scales shall prevail, and the Court sees nothing illegal in such a regulation.

There is no question, of course, at the present time but what employees have a perfect legal right to fix a price upon their labor and to refuse to work unless that price is obtained, and they have this right not only as individuals but also in combination. They have the right to strike if such strike is conducted in a lawful manner and for no unlawful purpose. Of course, if the purpose of the strike is illegal, or the means employed in conducting the strike are unlawful, then the Court should give relief by way of injunction. But that does not seem to be the situation in the case at bar. This is not an instance where any unlawful means have been attempted to be used.

On the facts, therefore, as shown by the testimony in this case, and on the law, the Court is of the opinion that the complainant is not entitled to a preliminary injunction and the prayer for the same is denied.

C. P. No. 1.

No. 10111, March Term, 1925.

In Equity.

H. NEWTON MARSHALL, *Trading as* H. NEWTON MARSHALL COMPANY, *Plaintiff*,

vs.

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA ET AL.

Opinion.

This case came on to be heard on Bill to temporarily restrain the Local Unions affiliated with the National Union from causing or threatening a strike of Union Painters upon certain contracts which Plaintiff has for painting in Philadelphia. The Plaintiff is a Boston corporation.

Subsequently an Answer was filed and the case then proceeded as upon Bill, Answer and Replication for Final Hearing.

The Bill alleges that Defendants are local unions affiliated with the National Union of Painters, Decorators and Paperhangers of America; That the Constitution or By-laws of said Union provide, *inter alia*—

> "*Section 132.* Neither the General Executive "Board nor any other authority shall have power "to grant exclusive or special privileges to any

"local union or district working under a charter "of this Brotherhood; nor shall the G. E. B. or "any other authority be invested with power to "force any employer to bring men from one city "to work in another city if union men can be pro- "cured in such city where the work is to be erected "and finished. All conditions of such localities "shall be strictly adhered to, the shorter work day "and the higher scale of either locality to prevail "in all cases. A card fully paid up, regardless of "where it is issued, shall entitle the holder to the "right to work in any city provided he conforms "with the working rules and conditions of the "locality and that no strike or lock-out exists in "that locality.

"When a contractor, builder or boss painter does "any work pertaining to our trade outside his home "city or town—and in a locality where a District "Council or a Local Union exists—not less than fifty "(50) per cent. of the men in such district shall be "employed on all work coming within the jurisdic- "tion of the Brotherhood of Painters, Decorators "and Paperhangers of America as defined in the "General Constitution."

"*Section 133.* A member leaving the jurisdic- "tion of the local union in which he is a member "to work for his employer on a job in the jurisdic- "tion of another local union must comply with the "working rules of that locality and demand in all "cases the shorter work day and the higher scale."

"*Section 255.* When any difficulty arises between "the members of any local union and their em- "ployers, the members shall lay the matter before "the local union or district council, in special meet- "ing assembled, and, if they be endorsed, the Presi- "dent shall appoint an arbitration committee to "wait upon the employers and endeavor to adjust

"the difficulty. Said committee shall report at the "next stated meeting and, if no adjustment can be "effected, the local union or district council shall "then take such course as is prescribed in this con- "stitution. Where district councils exist, strikes "and lockouts shall be under their supervision. "They shall however, be governed by the provisions "of this constitution."

"*Section 271.* Any member who acts in violation "of his obligation or who violates any article or "section of the constitution of the Brotherhood or "the By-laws of a local union, shall be fined or ex- "pelled at the discretion of the local union.

"Local Unions of special branches shall have the "power to enforce and collect fines for all viola- "tions of the special trade rules of that particular "branch of the trade."

The Bill likewise alleged a written agreement entered into between Plaintiff and District Council No. 21, wherein it was alleged Defendants agreed to work for Plaintiff at the Philadelphia rate for labor (see Exhibit C of Bill).

That the rate of wage for similar labor in Boston is One Dollar and ten cents ($1.10) per hour and in Philadelphia One Dollar ($1.00) per hour; that Defendants have refused to work for Plaintiff except at the Boston rate, in accordance with the By-laws and Constitution of their National Order (see *supra*), and that such a provision is a restraint of trade upon Plaintiff and unfair discrimination.

Defendants filed an Answer to this Bill denying the material allegations thereof, admitting their refusal to work except under their Constitution and By-laws, and denying also that said letter offered in evidence as a contract binding upon the Defendant Local Union No. 21 was of any binding force except when Plaintiff opened up a

regular place of business here, and became a local contractor.

The bill prays for specific relief, as follows:

"*(a)* From ordering, advising, encouraging, "participating, persuading or contributing money "or advice to any strike or cessation of work of "any of plaintiff's employees, upon the ground that "plaintiff has declined to pay a higher rate of "wages and to observe union conditions more "favorable to the defendants than those prevailing "in the district in which the work is being done, "or to pay a higher rate of wages and to observe "union conditions more favorable to the defend- "ants than those which contractors engaged in a "similar business in said districts are required to "pay or for the reason that plaintiff has employed "painters who are not members of the Brotherhood "of Painters, Decorators and Paperhangers of "America because of the refusal of the members "of said union to work for the plaintiff unless and "until plaintiff should comply with the rules and "regulations referred to in this bill.

"*(b)* From ordering or suggesting to any per- "son or persons, including members of the "Brotherhood aforementioned, its district councils "and/or local unions affiliated therewith, that they "should refrain from entering the employ of the "plaintiff, and from proceeding in any manner "whatsoever to discipline any union members for "working for the plaintiff, and from doing any act "or thing whatsoever to restrict the plaintiff or his "employees from the free and unhindered control "and conduct of the plaintiff's business.

"*(c)* From entering upon the work upon which "plaintiff is engaged and/or from approaching any "employees of the plaintiff, whether members of

"the union or not, for the purpose of interfering "in any way, shape or manner whatsoever between "the plaintiff and his employees, upon the ground "that the plaintiff should pay the rate of wages "and observe the union conditions prevailing in the "city of Boston, or elsewhere, rather than those of "the place in which the work is being done.

"*(d)* From enforcing or attempting to enforce "any provision, rule or order of the Brotherhood "of Painters, Decorators and Paperhangers of "America, or of any of the district councils or local "unions affiliated therewith, or of any of the offi- "cers or agents of said organizations, which would "require the plaintiff, where there is a difference "between the wage scale in the city where the plain- "tiff's main place of business is located and the "district where the work is being carried on, to pay "the higher of the two wage scales and to observe "the union conditions more favorable to the de- "fendants.

"*(e)* From interfering with the employment by "the plaintiff of workmen of any kind, whether "union members or not, upon the wage scale and "under the conditions existing in the district in "which the plaintiff is engaged in work.

"*(f)* From going on strike or threatening to go "on strike, or ordering or attempting to cause any "of the defendants, or any of the members of the "various district councils or local unions affiliated "with the Brotherhood of Painters, Decorators and "Paperhangers of America to go on strike on any "job or jobs where or because the plaintiff declines "to comply with Section 132 of the Constitution of "the Brotherhood of Painters, Decorators and Pa- "perhangers of America, or any other provision "or rule of the said Brotherhood, and/or any dis- "trict councils, and/or any local unions affiliated

"therewith, under the terms of which plaintiff would "be compelled to pay a rate of wages and to ob- "serve union conditions other than those prevail- "ing in the district in which he is engaged upon "his work.

"*(g)* From any and all acts and from the use "of any and all ways, means and methods which, "by putting or attempting to put any person, firm "or corporation in fear of loss or trouble, will tend "to hinder, impede or obstruct the plaintiff from "obtaining contracts for work, or workmen to per- "form its contracts when obtained.

"*(h)* From making or circulating in any way "any statement that the defendants or members of "unions affiliated in any way therewith, will refuse "to work for the plaintiff or from any person, firm "or corporation employing or entering into con- "tract with the plaintiff.

"*(i)* From combining or conspiring in any way "to prevent the employment of or the entering into "contract with the plaintiff by any such person, "firm or corporation as may desire to employ or "enter into contract with him.

"*(j)* From calling, suggesting, or in any way "aiding in a sympathetic strike or strikes, and from "carrying on any boycott of the plaintiff."

Requests for Findings of Fact and Conclusions of Law were filed by the Plaintiff, which have been considered by the Court, as suggestions in accordance with Rule 67 of the New Equity Rules.

From the Bill, Answer, Replication and Testimony taken, the Court finds the following:

Facts.

I. Plaintiff is a contractor, in the business of Painting, whose place of business is in the City of Boston, State of Massachusetts, and carries on said business throughout the United States.

II. That in carrying on said business, where he secures work in localities other than Boston, he secures the necessary materials through his Boston office from dealers in the vicinity of Boston, and ships same to the locality where such work is to be done

III. Plaintiff has secured two contracts in the City of Philadelphia for painting and decorating (Exhibit A and B of Bill).

IV. The plaintiff employed a foreman and one man, an apprentice, members of Philadelphia Local Union, on one of the contracts, and offered to pay the Philadelphia rate of wages of One Dollar ($1.00) per hour.

V. The rate of labor in Boston for the same class of work is One Dollar and ten cents ($1.10) per hour, in Philadelphia, One Dollar ($1.00) per hour.

VI. The defendants advised those employed by Plaintiff of the rules governing the Union, and their liabilities to fines and dismissal from the same, but called no strike or threatened none up to the filing and hearing of said Bill.

VII. That a conference was held between Plaintiff and Defandants' representatives and said letter (Exhibit C of Bill) was discussed and Plaintiff was advised that it was not considered binding, but to present the matter to the Council, which was then sitting, which was not done.

VIII. Defendants offered to supply all the men necessary to Plaintiff under the scale of wage paid by Plaintiff in Boston, to wit: One Dollar and ten cents ($1.10) per hour, as required by its constitution and rules.

IX. Plaintiff has declined to pay said Boston scale of wages and insists upon the Philadelphia rate of One Dollar ($1.00) per hour.

X. There is no evidence produced that Defendants have called any strike on Plaintiff's work, or asked that any sympathetic strike be called on any of Plaintiff's other contracts throughout the country.

XI. The rate of wages for the same class of work varies in different cities and localities. In New York, it is One Dollar and thirty-one and one-quarter cents ($1.31¼) per hour; Pittsburgh, One Dollar and Forty-three and three-quarter cents ($1.43¾) per hour; Philadelphia, One Dollar ($1.00) per hour; Lawrence, Mass., One Dollar ($1.00) per hour, and in some Southern cities, it is less than One Dollar ($1.00) per hour; Chicago, One Dollar and fifty cents ($1.50) per hour, and in Washington, D. C., One Dollar, twelve and one-half ($1.12½) per hour.

Discussion.

The Plaintiff is a Boston contractor and in the year 1923 had a contract to paint the Victor plant in Camden, New Jersey. At that time, the rate of wage in Boston was One Dollar and ten cents ($1.10) per hour and in Philadelphia One Dollar ($1.00) per hour, and the same questions arose as in the case at bar. It was finally adjusted and the Boston rate paid.

The letter offered in evidence as being a binding contract to furnish men on all future work obtained by the Plaintiff in this locality was signed. We do not agree with Plaintiff that his interpretation thereof is correct, as the testimony clearly showed that it was merely the understanding of the representative of the Union who settled the Victor contract dispute; *i. e.*, Should Plaintiff become a local contractor with an established place of

business in Philadelphia, then he would be furnished Union men at the Philadelphia rate, as all other Philadelphia contractors employing union labor, are.

The present dispute arose over two contracts which Plaintiff has secured in Philadelphia and raises the question whether the Union has under its constitution and rules a right under existing laws to enforce them, or whether such rules and regulations are not in restraint of trade, and unjust discrimination between local and foreign contractors.

From the testimony, it appears Plaintiff, at the time of entering into the Victor contract also had a contract in Lawrence, Mass., where the rate of wage was One Dollar ($1.00) per hour; that it had established for that work a local branch of its Boston office, and endeavored to bring men from Lawrence to Camden, so as to obtain local union men here at the same rate of wage, to wit: One Dollar ($1.00) per hour.

In this they were unsuccessful. In the present case, plaintiff has opened a local office, merely for the superintending of the work here, and not as a permanent place of locality for the conduct of its general business, and consequently, not in conformance with the alleged contract. (Exhibit C of Bill.)

If this then be a contract, it raises the main question as to whether the provisions of the National Union's Constitution and rules, to which all Districts and Locals are subject is in restraint of trade and creates an unfair discrimination.

There is no evidence before this Court of any threats to prevent one from working for Plaintiff, or of any strike called by Defendants, but on the contrary, the evidence shows that Defendants will furnish men at the Boston rate of One Dollar and ten cents ($1.10) per hour,

but the Union men will not work for less, being an outside contractor.

The rule of the organization above referred to does not in our judgment create a discrimination against this particular employer, nor is it in restraint of trade.

> "Employees have a right to fix the price upon "their labor, and to refuse to work unless the price "is obtained. They have that right both as indi- "viduals and in combination. They may organize "to improve their condition and to secure better "wages."
>
> New Jersey Painting Co. *v.* Local No. 26, 126 Atl. 399.
>
> Maryland Lodge *v.* Adt., 100 Md., 249.
>
> Natl. Protective Asso. *v.* Cummings, 170 N. Y., 16 R. L. C., P. 432, Sec. 16, 321.

As was said in New Jersey Painting Co. *v.* Local No. 26, *supra*,

> "The Rule adopted and promulgated by defend- "ants is not aimed at and does not apply to the "Complainant solely. It does not seek to establish "arbitrary discrimination between one person or "Corporation and another. It applies to all em- "ploying painters within the whole territory of the "United States, who undertake to do work outside "of their home districts. It applies to all alike "automatically who come within the prescribed "rule."

The cases relied upon by the Plaintiff in this case are all cases wherein the Union to enforce some of its claims, sought to do so by means which were unlawful irrespective of any statute upon the questions involved and where such a question arises, the courts will act promptly to restrain them. Unions have the right to strike conceded by the plaintiff, where such strike is conducted in a law-

ful manner and they likewise have the right to peaceably persuade workers from taking their places where a strike is in progress, but when they go beyond the lawful means, Courts are quick to act.

The question here presented raises one upon the idea that a Union cannot in good faith frame or adopt a rule providing for a sliding scale of wages to fit ostensibly the varying local economic conditions that such regulations create an unfair restraint of trade; that is, its effect upon the employer. As was said in N. J. Painting Co. *v.* Local No. 26, *supra*—

> "The law gives the defendant a right to sell their "labor to whom they please, when and under such "conditions as they may fix, individually or in com- "bination. They may make rules and regulations "passed in good faith, providing for what they may "deem to be an economic advantage to themselves; "if in the enforcement of such rules and regula- "tions, they violate no law, but act solely for the "declared purpose, the Courts ought not and cannot "legally enjoin them from such concerted action, "simply because such action may affect some em- "ployers. * * * "

We cannot agree with the conclusion reached in the case of Hass *v.* Local Union No. 17, 300 Fed. Rep., 894, wherein it was held, *inter alia*,—

> "The effect of the rule in question is to make it "difficult, if not impossible, for an outside con- "tractor. * * * The injury thus inflicted on the "outside contractor and the public cannot be justi- "fied, since no legitimate interest of the defendants "would be furthered by the operation of the rule "in question."

We do not see how the public can be injured by any such means.

As shown by the testimony and under our view of the law, this rule is one passed for the sole benefit of the Union and its members, in total disregard of the contractor, and having, as before stated, the right to fix the price of their labor, it is not a restraint on trade, nor does it create unfair competition as long as the Union uses lawful means to enforce their rules.

The evidence discloses that in all cases brought to the attention of the Court, where other than Local contractors had work in this jurisdiction, the higher rate prevailing in his home district, was paid by the contractor. In fact, the Plaintiff himself has done the same in other jurisdictions.

The provisions of Section 132, provide, *inter alia*—

> "All conditions of such localities shall be strictly "adhered to, the shorter work day and the higher "scale of either locality to prevail in all cases."

The purpose of such a clause or rule is to establish a standard rate of wages. There is no evidence of anything unlawful having been done.

For the foregoing reasons and under the foregoing authorities, we conclude there is no reason shown for the exercise of Injunctive Relief, and the Bill, therefore, should be dismissed.

Conclusions.

1. There is no ground shown for equitable relief and the Bill should be dismissed.

2. The Bill is dismissed at the cost of the Plaintiff.

The Prothonotary will notify the parties hereto of the above Findings and Conclusions so that exceptions thereto may be filed within ten days, if desired.

BARTLETT, *P. J.*

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between

J. D. LOIZEAUX LUMBER CO.,
Complainants,

and

CARPENTERS' AND JOINERS' LOCAL OF ROSELLE, N. J., and ELIZABETH, N. J., No. 350, *et als.*,
Defendants.

} *Conclusions.*

On Motion for Preliminary Injunction.

BUCHANAN, *V.-C.*

Complainant is a manufacturer of and dealer in building material (lumber and mill work), operating an "open shop,"—that is, employing men irrespective of whether or not they are members of the Union. There are ten other similar concerns in Union County, of which nine operate as "closed shops," that is, they employ none but union labor, and in return for such agreement the unions authorize and permit them to place the union label on the material turned out by them. Complainant, of course, has no right to use, and does not use, the union label on its material. Its employees are satisfied with the conditions of their employment. There is no strike.

The union in question is the United Brotherhood of Carpenters and Joiners of America, an unincorporated association of some four hundred thousand members belonging to some twenty-seven hundred local unions or branches in various municipalities in the United States and Canada. Two of these local unions, No. 350, of Ro-

selle and Elizabeth, and No. 155 of Plainfield, and their respective business agents, William Roehner and William Lunger, are the defendants who have been served and appeared. (Service of the Order to Show Cause was not obtained on the International Body.)

Clearly the two defendant locals are seeking to compel the unionization of Defendant's Plant and also the only other open shop plant in the country, and thus to complete the unionization of all the wood working mills in Union County at least. (As a matter of fact, the field covered by the eleven mills in Union County spreads out over parts of adjoining counties as well.) At meetings in April, last, the two defendant locals decided that "in future the members engaged as outside carpenters insist that all sash, frames, doors, and other detail mill work erected by them on buildings bear the union label of the United Brotherhood of Carpenters and Joiners of America." Since only closed shops where only union men are employed can use this label, this is obviously an insistment that all the wood working mills in Union County—all such mills wherever situate supplying material to be used in Union County shall be closed union shops.

The purpose of the defendants, therefore, is unlawful—not considering for the present what acts, if any, have been done by defendants in the carrying out of that purpose. The purpose is unlawful because it is to establish a monopoly of Union labor in the Mill work industry in Union County and vicinity at least, and that is against public policy. *Baldwin Lumber Co.* v. *International Brotherhood of Teamsters*, 91 N. J. Eq. 240 at 248, and cases cited. In that case there was a strike, the purpose whereof was *inter alia* to compel complainants to agree to employ none but union labor—to conduct closed shops. A strike is lawful if it is not for an unlawful purpose, and if it is not carried on in an unlawful manner. In the Baldwin case this court held not only that the strike

was being carried on in an unlawful manner and that such unlawful acts should be enjoined, but also that the strike itself, being for the unlawful purpose of establishing a monopoly as aforesaid was unlawful, and that therefore the defendants should be enjoined,

> "from promoting, encouraging, directing, participating in, in any manner whatsoever, the strike against the complainants; from contributing money or advice towards the success of the strike."
>
> "From advising with, participating in, encouraging, persuading, or consulting with striking employees of complainants or others, with the design of securing agreements from complainants by which they agree to employ none but Union labor."

(these being the "subdivisions A and B of the prayer of the Bill," mentioned on page 250 of the opinion). In other words, that the strike itself should be enjoined.

For the same reason, then, the defendants here should be enjoined from committing any acts in the carrying out of this unlawful purpose, however lawful in themselves such acts might otherwise be—if they have in fact committed or threatened acts in pursuance of this unlawful purpose which have resulted or are likely to result in irreparable injury to complainant.

That defendants have done acts towards the accomplishments of this purpose is admitted by defendants—though there is dispute as to just what those acts have been. That the result of those acts—even those which are admitted by defendants—has already caused serious injury to complainant, and will, if continued, cause irreparable injury to it, is amply established by complainant's affidavits, and is not denied by defendants' affidavits, nor disputed in their argument.

As appears by defendants' affidavits, the International or "parent" union, has a rule of which the part here pertinent is as follows:

> "It shall be the duty of all * * * local unions and each member * * * to make it generally known to the members of the local union that it is *necessary* (italics mine), to all members and the United Brotherhood that products made in factories * * * where only members of the United Brotherhood are employed, should be installed by fellow members."

In other words, this is clearly a notice or direction from the parent body to the local and their members that only products made in closed union shops should be installed by members of the union. It is true that the word "only" does not appear in the rule—but is equally true that it is meant to be understood as though it were there. This cannot be denied without depriving the word "necessary" of all force and effect and depriving the "rule" itself of meaning and of purpose.

A few weeks before the filing of the bill, each defendant local union adopted the rule herein earlier referred to namely,

> "That in future the members engaged as outside carpenters *insist* (italics mine), that all * * * mill work erected by them on buildings bear the union label (*i. e.*, come from a closed union shop)."

"Insist" is antonymic to "yield." Where, as here, it qualifies something which the person who insists is himself to do or not to do. It excludes or is contrary to the idea of acting otherwise than in accordance with the thing insisted upon. If the members erect non-union mill work, they do not insist that only union mill work be erected by them. Insisting that all mill work erected by them be union made means refusing to erect non-union mill work.

This is indeed not controverted by defendants. They say that these rules are not mandatory; that there is no punishment for violation by a member; that no punishment has been threatened by the unions upon members who violated the rule; that it is a matter for each member to decide for himself. Assuming all this to be so, the argument is obviously specious. We are not here concerned with whether or not a member may or may not be punished for violating the rule. The significant thing, and the only significant thing, is that the adoption of the rule by each local union was an action of the union—was a collective agreement by the members of the union, that they would, in effect, refuse to erect a non-union millwork. Each man individually might lawfully refuse to erect and refrain from erecting non-union millwork, but for any man to so refuse, in pursuance of a combination or agreement is another matter.

Subsequent to these "decisions" or agreements of the local unions, the two individual defendants, Roehner and Lunger, as business agents of the respective locals, went about amongst the members of their unions, on the several construction jobs on which they were working and spoke to the men, about this rule—as a part of their duty when they "see the rules of said union not being adhered to;" and also told some of the master builders and contractors of the rule. This is all admitted by Roehner and Lunger.

The allegations in complainant's affidavits are to the effect that Roehner and Lunger did more than this; that they told quite a number of the master builders and contractors who were using millwork bought from complainant that complainant was to be compelled to unionize its shop, and that they must not erect millwork bought from complainant, that if they did, their jobs would be declared unfair, and the men would be fined or called off from work.

Defendants' affidavits deny that complainant's name was mentioned, or that any threats were made. Without going into detail, a comparison, weighing, and analysis of the affidavits on both sides satisfies me that threats were made as alleged.

However, accepting as the fact simply Roehner's and Lunger's own affidavits of what they did, the result would be the same. There were only two non-union mills in the county, complainant's and one other This other, as defendants knew, was willing to unionize its shop if complainant would do likewise. It was primarily complainant's shop, therefore, which defendants were seeking to compel to be unionized. Moreover, the thing would be no different, if their acts were directed against two mills instead of one. A boycott is not made lawful because directed against two mills instead of one.

On their own showing, defendants formally agreed that the union members should erect only union made millwork —should not erect non-union millwork. They spread notice of this agreement of resolution amongst the members who might not have been present at the meeting. They also notified the master builders and contractors of this action. To say that this does not amount to an agreement to boycott non-union millwork and a threat thereof to the contractors, is to cast aside common sense. These were men, dealing with men, about matters that concerned their livelihood—not children playing with children. They were not passing resolutions by way of pastime, not talking mere persiflage. Their threats were none the less threats merely because they were not expressed in A. B. C. language. They were meant to be understood, as threats, and they were so understood. Defendants do not say that they told the men or the contractors that these rules were not enforceable and that it was a matter for each union man to decide for himself.

The thing which was agreed upon, and which was threatened, was a boycott, such as a boycott of the complainant by the contractors themselves would have been. It is unlawful—certainly at least under the circumstances of this case.

> "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. Div. 598, at 613."

This statement, after being cited with approval and followed by Vice-Chancellor Green, in *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101, at 117, was enunciated as the law of this state by the Court of Errors and Appeals in *Brennan* v. *United Hatters, &c.*, 73 N. J. L. 729 at 745.

If these defendants should do that which they have threatened to do, they would, of course, thereby damage complainant's property and trade; equally of course, they would be acting intentionally. They would therefore be guilty of an actionable tort unless there be just cause or excuse on their part for so doing.

The only matter set up or suggested by defendants by way of just cause or excuse, is the advancement of the interests of the union and the betterment of the condition of the members. Such objections and purposes are entirely lawful and praiseworthy in themselves, but they do not constitute just cause or excuse for the threatened acts and injuries.

It is immaterial that no actual refusal to erect complainant's millwork has occurred. It is the function of equity to prevent threatened injury—to save complainants from the damage which could not be adequately redressed at law. Where it appears, as it does in this case, that such

wrongful acts and injuries have been threatened and the facts and circumstances show, not a mere unsupported fear by complainants of possible harm, but a reasonable and probable expectation that the threats will be carried into execution to their damage, complainants are entitled to restraint.

I will advise an order for restraint *pendente lite*, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THE AEOLIAN COMPANY; RUDOLPH WURLITZER COMPANY; M. P. MOLLER, INC., ESTEY ORGAN COMPANY; SKINNER ORGAN COMPANY; and AUSTIN ORGAN COMPANY,

Plaintiffs-Appellants,

—against—

JACOB FISCHER, Individually, etc., *et als.*,

Defendants-Appellees.

Before: MANTON, A. N. HAND and CHASE,
Circuit Judges.

Appeal from the District Court for the Southern District of New York. Suit by plaintiffs for an injunction restraining the defendants' interference with their interstate commerce and committing acts in violation of the Sherman Anti-Trust Act, as amended by the Clayton Act. Decree for defendants; plaintiffs appeal. Reversed.

PAVEY & HIGGINS, ESQS.,
Attorneys for Appellants.

WALTER GORDON MERRITT, ESQ.
JAMES C. HIGGINS, ESQ.
of Counsel.

JAMES E. SMITH, ESQ.,
Attorney for Appellees.

MANTON, Circuit Judge.

The appellants appeal from a decree dismissing the bill of complaint after final hearing. The suit seeks to restrain the appellees, labor unions and individuals associated with them, from combining to restrain interstate commerce and destroying the business of the appellants by calling strikes or threatening to call strikes in building trades employed on buildings where the appellants were installing their organs, sold and shipped in interstate commerce. The case was here before (Aeolian Co. *v.* Fischer, 29 Fed. (2d) 79) where we affirmed an order denying the application for a preliminary injunction.

All the appellants, but one, are foreign corporations and are organ manufacturers selling their product in interstate commerce to moving picture theatres, churches and for private uses. The contracts are interstate in their nature and provide for the building, shipping, erection and sale of the completed organ in the house of installation.

The record differs in one aspect from that which we considered when it was here before. At final hearing, it was established and found by the court below, that the appellants were engaged in interstate commerce in the sale, shipment and installation of its organs. The court below found that the appellants, with one exception, maintained organ factories outside of the State of New York and entered into contracts for the sale and installation of organs within the State; that the essential parts of the organ are made in the factories, with the exception of the flues leading from the air pipe to the air box of the chambers; some parts are temporarily assembled before shipment and are tested in the factory, but shipment is then made in separate parts and installed on the premises of the purchaser. The district judge said:

> "The agreement of the organ manufacturer to install is not only relevant and appropriate to the

> interstate sale but is essential if an organ, as distinguished from its parts, may be sold at all. The thing sold is a musical instrument, complete in itself. * * * Without descending to mechanical description it may be said that the work of installation is of the most vital importance in the construction of the completed organ, and requires in its performance not only the highest mechanical skill but a thorough understanding of the methods employed by the manufacturer in the arrangement of mechanical and electrical connections. * * * Whatever distinctions may be drawn in doubtful cases, it is clear that the instant case is governed and controlled by the decision in the ice machine case. (York Mfg. Co. *v.* Colley, 247 U. S. 21.) The distinction there drawn betwen the setting up of lightning rods (Browning *v.* Waycross, 233 U. S. 16) and the installation of an ice machine shows that the contracts here in question for the construction and installation of organs clearly involve interstate commerce not only in the manufacture and shipment of the organ, but in its installation after arrival within the State."

With this conclusion we agree.

The only work performed by the purchaser is hoisting the organ parts if unduly bulky, installation of high voltage electrical connections, furnishing and installing the wind trunking between the blower room and the organ chamber, and the furnishing of light, heat and electric power required for the erecting, tuning and completion of the instrument. The other work of installation was performed by the appellants' skilled workers.

Labor troubles developed in the industry because of demands made by Organ Workers Local No. 9, relative to wages and working conditions and the employment of men in New York City. This related to installation work. A general strike was called by that union which lasted for fourteen weeks in 1925. In September, 1927, a delegate of the Organ Workers Local No. 9 presented a form

of union contract for signature to the appellant, Wurlitzer Co., which made provision for the employment of none but union men and women. This contract was not signed by this appellant and some of the men who were members of the union left the union. Organ Workers Union No. 9 became affiliated with the Building Trades Council through the representation of its delegate and the council consisted of various building trade unions of New York City. Its constitution forbids "their members to work with a non-union man, or with members of a dual or hostile body to any industry represented." This co-operation on the part of the unions made it impossible for an employer or contractor engaged in the building trades to do his work with non-union men and the record shows that it is impossible for a building to be erected in this city without the exclusive employment of union labor. It resulted in having the force and effect of the Building Trades Council in back of the efforts of the Organ Workers' Local No. 9, to force unionism upon appellants' non-union organ workers. It may be questioned whether installation of an organ is the work of erecting a building, for when it is installed, the organ is still a musical instrument.

Organ Workers Local No. 9 is also affiliated with the Combined Amusement Crafts, an association of stage hands and theatre operators whose sympathetic support it had threatened to use. In February or March, 1928, Local No. 9 had a membership of about ninety men and its delegate endeavored to get the non-union men to join. His purpose was to unionize fully the outside work of erecting organs in New York and other parts of the country and then to unionize the factories by the requirements that all organs erected in a building where union labor is employed must be manufactured by union men and bear the union label. In order to prevent non-union men working in the buildings where the appellants were installing organs, the delegate of Local No. 9 told purchasers of or-

gans that he would call out all the trades on strike if the particular organ was installed by non-union men. This threat was made to one Hammerstein, a purchaser of an organ for the Hammerstein Temple of Music, and to an owner who purchased an organ for the Plaza Theatre. In the Elks' Club, Brooklyn, one of the appellants' (the Aeolian Company) men were locked out from the building. At the Plaza Theatre in Linden, N. J., workers were secretly substituted for the Wurlitzer men in violation of the terms of the contract of installation and after these men had been discovered and removed, it became necessary for the Wurlitzer Company to work at night in order to avoid interference with the building trades. The Wurlitzer Company men were driven from the work at the Ritz Theatre, Lindenhurst, N. J., and were off the job for a week until the electricians and other building trades had completed their work. Another instance of interference was a delay of from two to four days at the Castle Hill Theatre. Men were assaulted at the Marble Hill Theatre and the entire force had to be removed and stayed away for about six weeks. The Wurlitzer men were arrested for trespassing at the Oxford Theatre, Little Falls, N. J., after the general contractor had been served with a general strike order. The owner of the Pythian Theatre was threatened with a general strike and he paid to have the organ workers reinstated in the union so that they might finish the work unmolested. One contract, between the appellant Estey Organ Company and the Capital Theatre for additions and repairs to an organ, was cancelled after threats to call out the theatrical trade and the work was finished by union men not in the employ of the Estey Organ Co. The Austin Organ Company's workmen were taken off the installation of a theatre at Mount Vernon, N. Y., after threats made by a union delegate and were not permitted to return until after they had been unionized at the company's expense. The Skinner Organ Company was given three days of grace to

unionize its men at the Colony Theatre and they were only allowed to go on with the work after they had joined the Local No. 9 at the expense of that company. Other acts of interference with the appellants' interstate commerce consisted of threats to strike and unjustified claim of right of the sheet metal workers delegate to do the wind trunking within the organ as well as without; also threats were made by the riggers union delegate that the organ would have to be taken out of the building because it was rigged by non-union men. In one instance a switchboard was nailed up and the electric wires cut by an electrician on the Universal Theatre job. The Electricians Union, Local No. 3, refused to do the wiring on the organ installed in the Church of the Redeemer in Brooklyn, and a general strike followed there.

These interferences with the appellants' business have seriously affected their good will, for organ purchasers are fearful of contracting with them, feeling that they would have difficulty in installing their instruments and also with the building trades unions. This interference stands uncontradicted, although the delegate of Union No. 9 was a witness for the defense.

In Anderson *v.* Shipowners (272 U. S. 359), plaintiff sought to enjoin the Ship Owners' Association whose men controlled substantially all the merchant vessels of American registry, who engaged in interstate and foreign commerce, because they had entered into an arrangement to control the employment of all seamen on their vessels by maintaining employment agents in California and where every seaman was compelled to register and await his turn in order to secure employment. No person could secure employment unless he was registered, with the result that some seamen were delayed in securing work. The plaintiff was barred from employment because of failure to comply with these regulations and brought this

suit asking for an injunction and damages. In holding that the combination was illegal, the court said:

> "If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce, and within the Commerce Clause no less than cargoes. * * * It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate the employment of men, and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint. * * * These shipowners and operators, having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-Trust Act."

The undoubted purpose of the appellees was to monopolize the work with which the appellants were concerned, that is, the installation of organs, and require only their membership or union workers for each job. It restricted the liberty of employers and employees to engage in interstate commerce, whenever the employment of non-union members is involved, and is an interference with interstate commerce. It is immaterial whether the combination is unlawful because it interferes with the right of non-union men to engage in such part of interstate commerce or with the right of employers of non-union men to so engage; the result is the same. If the com-

bination is illegal for either reason, the person or corporation injured in its or his property rights is entitled to relief. Chattanooga Foundry & Pipe Works *v.* City of Atlanta, 203 U. S. 390; U. S. *v.* Colgate & Co., 250 U. S. 300; Loewe *v.* Lawler, 208 U. S. 274; U. S. *v.* Patten, 226 U. S. 525. The inquiry is not as the court below conceived it to be, whether or not there was a combination to exclude the appellants' organs from interstate trade or commerce. It is as much a violation of the Sherman Act, as amended by the Clayton Act, for combinations to exclude individuals from work in interstate commerce. Finding that the installation of the organ was work in interstate commerce and that there was a combination directly to restrict and obstruct that work, the opportunities of engaging therein was work of interstate commerce. But the interference with this interstate commerce was not confined to preventing workmen from engaging in the employment of the appellants as non-union men. There was a combination to obstruct and interfere with the appellants in carrying out their interstate trade and commerce in their usual and practical way which, of itself, was a violation of the act. It is not material or important whether the restraint operates upon this interstate commerce at the point of origin or at the point where it comes to rest. Bedford Stone Co. *v.* Journeymen's Stone Co., 274 U. S. 37; Binderup *v.* Pathe Exchange Inc., 263 U. S. 291; Ramsay Co. *v.* Associated Bill Posters, 260 U. S. 501; Duplex Printing Press Co. *v.* Deering, 254 U. S. 443. The combination formulated by the appellees to curtail the liberty of the appellants and their employees to engage in the phase of the interstate commerce involving installation, was a violation of the anti-trust laws and their refusals to permit non-union men to work and striking to interfere with the work of the appellants in installing organs, was a violation of the anti-trust acts. Duplex Printing Press Co. *v.* Deering,

supra; Bedford Stone Co. *v.* Journeymen's Stone Co., *supra.*

The organs involved were not part of the building construction and there is no evidence of any community of interest between the erectors of these organs and the numerous and various trades engaged in erecting a building. There was no evidence of close contact between these groups but the evidence is ample and undisputed that the purpose of the appellees was to secure for the organ workers' union a complete monopoly of the work of installing organs in New York and Northern New Jersey and to bring about a condition which would impose upon the craftsmen in the trade, for refusing to join their union, an impossibility of employment in their trade and thereby gaining a livelihood.

The appellee, Meller, made clear upon his examination that he was a member of the Building Trades Council and I "have something behind me." This he described as full sympathetic support and, as he said: "no organ will be erected in New York City unless they erect it by union labor, as the building trades will not work with any non-union workers." The courts have condemned such interference. Hitchman Coal Co. *v.* Mitchell, 245 U. S. 249; Bitterman *v.* Louisville & Nashville R. R. Co., 207 U. S. 205; Central Metal Products *v.* O'Brien, 278 Fed. 827; Hodge *v.* Meyer, 252 Fed. 479; Amer. Malting Co. *v.* Keitle, 209 Fed. 351; Irving *v.* District Council, 180 Fed. 896; Lehigh Structural Steel Co. *v.* Atlantic Smelting & Refining Works, 92 N. J. Equity 131; McCord *v.* Thompson-Starrett Co., 129 App. Div. 130.

In thus preventing the appellants and their employees from carrying on their business because the workmen do not belong to the union, there was formed a combination having for its primary purpose the obstruction of the appellants in carrying on their interstate business. The injury to them is not merely incidental; the direct

and immediate purpose is to oust the appellants and their employees from the conduct of their business in New York and its vicinity unless they submit. The means adopted to declare a labor boycott of all the trades on the buildings, within the affected area where the appellants carry on their business, and by their control of the building business, make it impossible for the owners, contractors or architects to do business in this area with the appellants. Such combination is a secondary boycott. Duplex Printing Press Co. *v.* Deering, *supra;* Central Metal Products *v.* O'Brien, 5 Fed. (2d) 389. In such a combination against an employer there is every suggestion of coercion, attempted monopoly and deprivation of livelihood and remoteness of the legal purpose of the union to better its members' condition. American Steel Foundries *v.* Tri-City Council, 257 U. S. 184; Hitchman Coal & Coke Co. *v.* John Mitchell, 245 U. S. 229; Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45.

The record before us justified a decree in favor of the appellants for an injunction.

Decree reversed.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THE AEOLIAN COMPANY, *et al.*,
Plaintiffs-Appellants,

—against—

JACOB FISCHER, individually, and as President of PIANO, ORGAN and MUSICAL INSTRUMENTS WORKERS' INTERNATIONAL UNION OF AMERICA, *et al.*,
Defendants-Appellees.

AUGUSTUS N. HAND, Circuit Judge: (concurring)

I concur with the majority because of the controlling decisions of the Supreme Court in Duplex Printing Press Co. *v.* Deering, 254 U. S. 443 and Bedford Stone Co. *v.* Stone Cutters' Association, 274 U. S. 34.

The District Judge relied on United Mine Workers *v.* Coronado, 259 U. S. 344; United Leather Workers *v.* Herkert & Meisel, 265 U. S. 457 and Industrial Association *v.* United States, 268 U. S. 64. But these decisions do not, in my opinion, support the conclusion reached. Mining is not Interstate Commerce; United Mine Workers *v.* Coronado, *supra.* Manufacturing is not Interstate Commerce; United Leather Workers *v.* Herkert & Meisel, *supra.* Building is not Interstate Commerce; Industrial Association *v.* United States, *supra.* In all of these cases the interference was at a point where Interstate Commerce was not in operation, but not as here at a point where in contemplation of law it continued to exist.

The fact that the installation of the organs was Interstate Commerce required that such installation (in the same way as transportation) should be free from unlaw-

ful interference. Because of the decisions in Duplex *v.* Deering and Bedford Co. *v.* Stone Cutters' Association, *supra*, we must hold that the interference here was unlawful and was a violation of the Sherman Anti-Trust Law.